

**United States Department of Labor
Employees' Compensation Appeals Board**

J.T., Appellant

and

**DEPARTMENT OF THE ARMY, U.S. ARMY
MEDICAL COMMAND, Fort Hood, TX,
Employer**

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**Docket No. 15-527
Issued: April 21, 2015**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 9, 2015 appellant filed a timely appeal from a December 19, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration of the merits of her claim. As more than 180 days has elapsed from the date of the last merit decision of May 30, 2014 to the filing date of the current appeal on January 9, 2015 and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the December 19, 2014 OWCP decision and on appeal, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, appellant contends that OWCP was not diligent in filing evidence, including a physician's report which she submitted with her request for reconsideration. She further argues the merits of her claim.

FACTUAL HISTORY

On March 29, 2014 appellant, then a 44-year-old food service worker, filed an occupational disease claim (Form CA-2) alleging that she sustained a right wrist injury due to washing, sanitizing, and rinsing 30 to 40 heavy trays repeatedly for approximately 2.5 weeks in the performance of her federal duties. She indicated that the dishwasher was broken and all tray, plate, and cup cleaning had to be done manually.

In an April 8, 2014 letter, OWCP notified appellant of the deficiencies of her claim. It afforded her 30 days to submit additional evidence and respond to its inquiries.

By decision dated May 30, 2014, OWCP denied the claim on the basis that appellant failed to establish fact of injury, finding that no factor of employment had been established.

On July 21, 2014 appellant requested reconsideration and submitted an individual sick slip dated June 25, 2014 from a physical therapist who indicated that appellant was injured and needed to wear a thumb spica brace during work duties.

By decision dated December 19, 2014, OWCP denied appellant's request for reconsideration of the merits finding that she did not submit pertinent new and relevant evidence and did not show that OWCP erroneously applied or interpreted a point of law not previously considered by OWCP.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.³ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁵ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her

³ *Supra* note 1. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

⁴ *See Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁵ 20 C.F.R. § 10.606(b)(3). *See A.L.*, Docket No. 08-1730 (issued March 16, 2009).

application for review within one year of the date of that decision.⁶ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁷

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record⁸ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁹

ANALYSIS

In support of her July 21, 2014 reconsideration request, appellant submitted an individual sick slip dated June 25, 2014 from a physical therapist who indicated that she was injured and needed to wear a thumb spica brace during work duties. The Board finds that submission of this document did not require reopening her case for merit review as it did not contain a medical diagnosis and was not focused on whether she had established a factor of her federal employment that caused or aggravated her condition, which was the issue before OWCP. Therefore, it does not constitute relevant and pertinent new evidence and is not sufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant did not submit any evidence to show that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP, nor did she submit any relevant and pertinent new evidence not previously considered. The Board finds that she did not meet any of the necessary requirements of 5 U.S.C. § 8128(a) and is not entitled to further merit review.¹⁰

On appeal, appellant contends that OWCP was not diligent in filing evidence, including a physician's report which she submitted with her request for reconsideration. As the record shows that OWCP did not receive any additional medical evidence from her, the Board finds that her argument is not substantiated.

Appellant further argues the merits of her claim. The Board noted above that it only has jurisdiction over OWCP's December 19, 2014 nonmerit decision which denied her request for reconsideration and, therefore, is precluded from conducting a merit review.

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ *See A.L., supra* note 5. *See also Eugene F. Butler*, 36 ECAB 393, 398 (1984).

⁹ *Id.* *See also Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁰ *See L.H.*, 59 ECAB 253 (2007).

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 21, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board